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a suit by preferred stockholders, *held*, the directors would be enjoined from so doing. *Wall v. London & Provincial Trust, Ltd.* (Ch. D. 1919) *The Weekly Notes* (June 21, 1919) 183.

The redemption of the debentures at a discount resulted in a gain in capital account to the amount of the discount. But the debentures in the principal case, being a promise to pay interest until redeemed by the company, see *Schachne v. Corp. Chamber of Commerce* (1918) 102 Misc. 197, 168 N. Y. Supp. 791, and in effect creating a debt, see *Levy v. Abercorris Slate & Slab Co.* (1887) L. R. 37 Ch. D. 260, 264; Cook, *Corporations* (6th ed.) §§ 14, 776, are not an investment, which is the placing of money at interest either by loan or by purchase of income-producing property; see *Una v. Dodd* (1884) 39 N. J. Eq. 173; 4 Words & Phrases, *Judicially Defined*, 3755; hence the provisions of the charter regarding investments are not applicable. However, since the capital of a corporation cannot be distributed as dividends, *Masonic Life Assurance Co. v. Sharpe* [1892] 1 Ch. 154; *Jorguson v. Apex Gold Mines Co.* (1913) 74 Wash. 243, 133 Pac. 465; 2 Cook, *op. cit.*, § 546, it follows that dividends can be declared only where the receipts exceed the expenditures, thus creating profits. 2 Machen, *Corporations*, § 1313; see *Masonic Life Assurance Co. v. Sharpe*, *supra*, at p. 157. The directors in the instant case, having calculated the gain realized by the difference between the liabilities before and after the redemption of the debentures, proceeded on the theory that the power to issue the debentures was a separate business, *cf. Lubbock v. British Bank of South America* [1892] 2 Ch. 198, and that this particular transaction could be isolated and the gain distributed regardless of profits and losses in other current transactions. Clearly, the gain in the capital account could properly be transferred to the revenue account, Machen, *op. cit.*, § 1320, and considered as an item of gross income. *Cf. Mackintosh v. Flint, etc., R. R.* (C. C. A. 1888) 34 Fed. 586, 606; 2 Machen, *op. cit.*, § 1334. But, in determining the net profits out of which dividends are to be declared, the company must consider the whole of its current business and cannot declare dividends from a particular profitable transaction without regard to the losses incurred from other transactions. *Foster v. New Trinidad Lake Asphalt Co.* [1901] 1 Ch. 208; *State v. Bank of Louisiana* (La. 1827) 5 Mart. N. S. \*327; 2 Machen, *op. cit.*, § 1315. Upon this latter ground the result reached in the principal case can be supported.

CRIMINAL LAW—APPEAL BY STATE—MOOT QUESTION.—The defendant was indicted for a violation of a section of the State prohibition law then in force, Colo. Sess. Laws, 1915, c. 98 § 10, and upon trial was acquitted. The State brought error to review the trial judge's interpretation of the statute. Between the time of the trial and the hearing of the appeal a new statute was passed. (Nov. 5, 1918, not yet reported.) *Held*, the question was moot, as the statute under which the defendant had been acquitted had been superseded by subsequent legislation, and the writ of error was therefore dismissed. *People v. Kokotovich* (Colo. 1919) 180 Pac. 80.

A criminal statute must be in force as well at the time of indictment, conviction and passing of sentence as at the time of the commission of the offence charged, to hold the defendant thereunder. *Commonwealth v. Marshall* (1831) 28 Mass. 350. A moot case is one where a determination of a point of law is sought on an existing or supposititious set of facts and the decision can have no legal effect

upon the rights of the parties to the action. *Muskogee Gas, etc., Co. v. Haskell* (1913) 33 Okla. 358, 132 Pac. 1098; *State v. Jones* (1914) 107 Miss. 462, 65 So. 511. Hence the question here was moot. In the absence of mandatory statutes based upon constitutional provisions, courts have steadfastly refused to decide moot questions, 2 Story, Commentaries on the Constitution (5th ed.) § 1571, p. 387 *et seq.* and n.; *California v. San Pablo & T. R. Co.* (1893) 149 U. S. 308, 13 Sup. Ct. 876, since this would constitute an unauthorized enlargement of the duties of the courts, *cf.* U. S. Constitution, Art. III, §§ 15, 16, not being a judicial function. *United States v. Evans* (1909) 213 U. S. 297, 29 Sup. Ct. 507. Accordingly, a statute granting to the United States the right of appeal in criminal cases without prejudice to the rights of the defendant, 31 Stat. 1341, was held unconstitutional. *United States v. Evans, supra.* On the other hand, several states have express enactments, *cf.* Miss. Const., Art. III, § 22, Miss. Code (1917) § 16(2); Ind. Const., Art. I, § 14, Ind. Rev. Stat. (1914) §§ 2162, 2212, giving the state the right of appeal in order to bind the inferior courts to a uniform application of the law. *Gulfport v. Stratakos* (1907) 90 Miss. 489, 43 So. 812; *State v. Hunt* (1893) 137 Ind. 537, 37 N. E. 409. For a discussion of declaratory judgments in general, see *infra*, p. 106. It should also be noted that courts will not generally entertain appeals by the government in criminal cases, as that would constitute such double jeopardy as is prohibited both by the common law and by the constitutions of the United States and the various states. *Grafton v. United States* (1907) 206 U. S. 333, 27 Sup. Ct. 749; *United States v. Sanges* (1892) 144 U. S. 310, 12 Sup. Ct. 609; *People v. Miner* (1892) 144 Ill. 308, 33 N. E. 40; *contra, State v. Lee* (1894) 65 Conn. 265, 30 Atl. 1110.

#### DIVIDENDS—WHEN EQUITY WILL ORDER DIRECTORS TO DECLARE A DIVIDEND.

—The board of directors of the defendant corporation refused to declare a dividend, although the surplus profits greatly exceeded the capital stock and all necessary needs for expansion. No fraud was alleged, but it was the avowed policy of the directors to retain all future profits, other than a small regular dividend, in order to lower the price of its product, not to meet competition, but for the benefit of the public. On petition of minority stockholders, *held*, the directors must distribute a substantial part of the surplus profits. *Dodge v. Ford Motor Co.* (Mich. 1919) 170 N. W. 668.

Although individual stockholders have no right at law to the profits of a corporation until a dividend has been duly declared, *Ford v. Easthampton Rubber Thread Co.* (1893) 158 Mass. 84, 32 N. E. 1036, and the declaration of a dividend rests within the discretion of the directors, *Schell v. Alston Mfg. Co.* (C. C. 1906) 149 Fed. 439; 2 Cook, Corporations (6th ed.) § 545, equity will grant relief to minority stockholders where the directors have acted fraudulently in withholding the profits. *Hiscock v. Lacey* (1894) 9 Misc. 578, 30 N. Y. Supp. 860. It has been held that in the absence of fraud or bad faith an injudicious refusal to declare dividends gives no ground for equitable interference. *Blanchard v. Prudential Ins. Co.* (1912) 80 N. J. Eq. 209, 83 Atl. 220; 2 Cook, *op. cit.*, § 545. And yet since an unreasonable or arbitrary refusal to declare dividends seems to provide grounds for equitable interference, see *Storrow v. Texas Consol. Compress & Mfg. Ass'n.* (C. C. A. 1898) 87 Fed. 612; *Raynolds v. Diamond Mills Paper Co.* (1905) 69 N. J. Eq. 299, 307, 60 Atl. 941; Morawetz, Private